# Yapp Pow Khin & Anor v Hjh Jamilah bt Udin

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NO 3 OF 2011
MORTIMER P, DAVIES AND ROGERS JJA
25 MAY 2011

*Contract — Repudiation — Damages — Principles of assessment — Whether measure of damages depended on whether right of action arose before time for completion of contract or after — Mitigation of damages — Onus of proof*

The respondent, who owned a 3.92-acre piece of land, entered into an agreement with the appellants for the latter to develop 40 shophouses on the land. Under the agreement, the respondent would, inter alia, be entitled to 14 of the shophouses and the appellants, to the rest for a term of 60 years. The appellants were required to begin construction of the respondent's shophouses within three months of receiving all necessary approvals and plans and the buildings were to be completed within two years. However, by the time the completion date under the agreement arrived, development work had not even commenced. The respondent sued the appellants for damages for repudiation of the contract. The High Court found for the respondent and ordered damages to be assessed by the registrar. The registrar's assessment was appealed against to the judge who allowed the appeal, assessed the respondent's loss at RM2,384,451 and gave judgment for that sum with interest and costs. Against that award, the appellants appealed to the Court of Appeal.

**Held**, dismissing the appeal but substituting the sum of RM2,900,322 in place of the damages awarded below, with interest and costs:

(1) The prima facie measure of damages for the appellants' repudiation was the value by which the respondent's interest in her land would have been enhanced by her completed shophouses at the time she accepted the appellants' repudiation, less the value of what she would have parted with, in money or kind, under the agreement by that date (see para 14).

(2) On whether the respondent had mitigated her loss, the onus of proof in mitigation was on the appellants and mitigation was primarily concerned with the avoidance of future loss. Here, the completion date had passed and the respondent's loss had crystallised by the time she accepted the appellants' repudiation (see paras 41–42).

(3) Other than in exceptional cases, a judge who decided an issue of liability should decide the issue of damages rather than referring it to a registrar,

which course would likely result in substantial delay and loss to the party entitled to the damages and a substantial increase in costs to both parties (see paras 2–3).

**[Bahasa Malaysia summary**

Responden, yang memiliki sebidang tanah berukuran 3.92 ekar memasuki perjanjian dengan perayu-perayu untuk perayu-perayu membangunkan 40 rumah kedai di atas tanah tersebut. Di bawah perjanjian, responden akan, antara lain, berhak kepada 14 rumah kedai dan perayu-perayu kepada yang selebihnya untuk tempoh selama 60 tahun. Perayu-perayu dikehendaki untuk memulakan pembinaan rumah kedai responden dalam masa tiga bulan selepas menerima kesemua kelulusan yang perlu dan pelan dan bangunan hendaklah disiapkan dalam masa dua tahun. Walau bagaimanapun, apabila tiba tarikh siap di bawah perjanjian, kerja-kerja pembinaan belum bermula. Responden menyaman perayu-perayu bagi ganti rugi untuk penolakan kontrak. Mahkamah Tinggi memihak kepada responden dan memerintahkan ganti rugi ditaksir oleh pendaftar. Taksiran pendaftar dirayu terhadap hakim yang membenarkan rayuan, menaksirkan kerugian responden pada RM2,384,451 dan memberikan penghakiman untuk jumlah tersebut dengan faedah dan kos. Perayu merayu kepada Mahkamah Rayuan terhadap award tersebut.

**Diputuskan**, menolak rayuan tetapi menggantikan jumlah RM2,900,322 sebagai ganti rugi yang diawardkan oleh Mahkamah Tinggi, dengan faedah dan kos:

(1) Ukuran prima facie ganti rugi untuk penolakan kontrak perayu-perayu adalah nilai di mana faedah responden di dalam tanahnya akan ditambah dengan rumah-rumah kedai yang telah siap pada masa dia menerima penolakan kontrak perayu-perayu, kurang daripada nilai yang telah dia keluarkan, dalam wang atau kebaikan, di bawah perjanjian pada tarikh tersebut (lihat perenggan 14).

(2) Mengenai sama ada responden telah mengurangkan kerugiannya, beban bukti dalam pengurangan adalah di atas perayu-perayu dan pengurangan mementingkan, khasnya, pengelakan kerugian masa hadapan. Di sini, tarikh siap telah berlalu dan kerugian responden menjadi jelas apabila dia menerima penolakan kontrak oleh perayu-perayu tersebut (lihat perenggan 41–42).

(3) Selain daripada dalam kes-kes luar biasa, hakim yang memutuskan isu liabiliti patut memutuskan isu ganti rugi daripada hanya merujuknya kepada pendaftar, yang mana akan mengakibatkan kelewatan yang substansial dan kerugian kepada pihak yang berhak kepada ganti rugi dan peningkatan yang substansial dalam kos kepada kedua-dua pihak (lihat perenggan 2–3).]

**Notes**

For cases on damages in general, see 3(3) *Mallal's Digest* (4th Ed 2011 Reissue) paras 5584–5588.

**Cases referred**

*Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, HL (refd)
*Mertens v Home Freehold Company* [1921] 2 KB 526, CA (refd)
*Robinson v Harman* [1848] 1 Exch 850; ; 154 ER 363 (refd)
*Roper and Anor v Johnson* (1873) LR 8 CP 167, HC (refd)
*Wertheim v Chicoutimi Pulp Company* [1911] AC 301, SC (refd)

**Legislation referred to**

Contracts Act, Chapter 106 s 74
Rules of the High Court [BR] O 37, O 56 r 2, O 57 r 7

*Rudi Lee (Fathan, Rudi Lee, Annie Kon & Associates) for the appellants.*
*Kelvin Lim (K Lim & Co) for the respondent.*

**Davies JA:**
**:**

THE APPEAL

**[1]** This is an appeal from a judgment of Judicial Commissioner Barnett on 9 February 2011 which was given on appeal from an assessment of damages by a registrar. The learned judicial commissioner allowed the appeal, assessed the plaintiff's loss at $2,384,451 and gave judgment for that amount with interest and costs. Before turning to the substance of this appeal it is worthwhile saying something about why, when judgment was given for the plaintiff in the High Court on 23 January 2006 for damages to be assessed, there is still no finality in this matter. On the assumption which, as we will demonstrate, is correct, that the plaintiff will ultimately receive an award of damages, this means that she will have been kept out of her money for more than five years after she could reasonably have expected a final judgment in her favour.

THE INJUSTICE COMMONLY CAUSED BY REFERRAL OF ASSESSMENT OF DAMAGES

**[2]** This unfortunate state of affairs was brought about because the learned judge who gave judgment on 23 January 2006 failed to proceed to assess damages but referred the assessment thereof to a registrar and the subsequent proceedings which that referral triggered. We have said before that referral of

assessment of damages to a registrar should not be a general practice; that it should occur only in exceptional cases. The failure of the judge to proceed to assess damages in this case is an example of how taking the course which she did is likely to result in substantial delay, substantial loss to the plaintiff and a substantial increase in costs to both parties.

**[3]** It is true that part of this delay and cost would now be reduced, in a case such as this, by the recent amendment to O 56 r 2 which now permits an appeal to the Court of Appeal from decisions of a registrar given on an assessment of damages under O 37. But that does not weaken our admonition that, other than in exceptional cases, a judge who decides an issue of liability should proceed to decide the issue of damages rather than referring that issue to a registrar.

## THE RELEVANT FACTS

**[4]** The plaintiff, who was the owner of a parcel of land, entered into a written agreement with the defendants dated 23 March 1998, called a development agreement, by which the defendant agreed to develop shophouses on the land, the object being that the parties would share in the proceeds of the development. It is necessary to state that agreement in a little more particularity.

**[5]** It recited that the plaintiff was the owner in perpetuity of a parcel of land containing 3.92 acres and that the defendants proposed to develop the land by constructing 40 three–storey shophouses thereon. It then provided:

(a) by cl 2 that the plaintiff would be entitled to 14 of those shophouses and that the defendants would be entitled to the remaining 26 for a term of 60 years;

(b) by cl 4 that the defendants would provide the finance and bear the entire costs and expenses of the project;

(c) by cl 9.3 that the defendants would commence and proceed with the construction of the plaintiff's shophouses within three months from the date of receipt of all necessary approvals and plans;

(d) by cl 9.5 that the defendants would complete the plaintiff's shophouses within two years of the date of receipt of those approvals; and

(e) by cl 9.6 that the defendants would pay to the plaintiff a penalty of $1500 per month for each of the plaintiff's shophouses in the event that the plaintiff's shophouses were not completed by the date stated in cl 9.5.

**[6]** Those necessary approvals were received, at the latest, on 20 March 2000.

Thus the defendants undertook to commence by 20 June 2000 and to complete the plaintiff's shophouses by 20 March 2002. It is not disputed that by that latter date the development work had not even commenced.

**[7]** Two further written agreements were executed by the parties. Both were described as supplementary agreements. The first was executed on 23 March 1998, the same date as the development agreement. The second, it seems, was executed on 26 March 1999.

**[8]** By the first of these the defendants agreed to pay to the plaintiff $100,000 within seven days from the commencement of piling work and directed and authorised the defendants to pay $30,000 to the plaintiff's daughter and $20,000 to the plaintiff's son out of the said sum of $100,000. By that agreement the defendants also agreed to advance to the plaintiff two sums:

(a) $300,000 on the signing and stamping of the principal agreement, repayable upon the plaintiff entry into an agreement to sell her first shophouse; and

(b) $160,000, as to $40,000 upon the signing of the development agreement and as to $120,000 within 30 days of receipt of all relevant approvals, repayable within seven days from the commencement of the earthwork on the project.

**[9]** By the second supplementary agreement the parties agreed:

(a) by cl 1 that only 12 of the shophouses would be three stories and that the remaining 28 would be of only two stories;

(b) by cl 2 that the plaintiff would be entitled to all 12 of the three-storey shophouses and two of the two-storey shophouses as identified on the site plan; and

(c) by cl 3 that the defendants would pay to the plaintiff $80,000 by instalments of $25,000 on the signing and stamping of the agreement and $55,000 on commencement of the piling work.

**[10]** It seems plain, on the construction of that agreement, that the $80,000 was consideration for the acceptance by the plaintiff of twelve three storey and two two storey shophouses in lieu of fourteen three storey shophouses.

**[11]** By the judgment of the High Court of 23 January 2006, referred to earlier, it was held that, the defendants having failed even to commence the project by 20 March 2002, the plaintiff was entitled to accept that breach as repudiation of the development agreement and, implicitly, that she did so, for the learned judge went on to say that the plaintiff was therefore entitled to

damages on that basis. Though it is not clear what the learned judge held to be the acceptance by the plaintiff of the defendants' repudiation, it is plain that she held that to have occurred in or about July 2002. There is no appeal from that judgment. This appeal is solely against the assessment of damages made pursuant to the order made on 23 January 2006, specifically, against the assessment made by Judicial Commissioner Barnett on 9 February 2011.

**[12]** What occurred after the date of that judgment is somewhat confused and confusing. What may be described conveniently as the first assessment of damages was made by a registrar on 11 July 2006. By it the registrar awarded $105,501 damages, 6% statutory interest from 23 January 2006 to the date of final payment and costs. This sum was awarded by way of liquidated damages pursuant to cl 9.6 of the development agreement. For reasons which we will explain, it is unnecessary to consider how the registrar arrived at this sum. What is important, for the purpose of this appeal, is why the registrar failed to assess damages in accordance with principle.

**[13]** In the first place, subject to some qualifications to which we will refer later, the registrar stated the principle correctly. She said:

> Compensation for the plaintiff would therefore be calculated as the market value of the shophouses at the agreed time of completion less the contract price which in this case would be the value of the plaintiff's land.

**[14]** Although we do not fully understand what the registrar meant by 'the contract price', we gather from her later judgment of 24 February, to which we will refer later, that she meant by this the consideration which would pass from the plaintiff for the benefit which she would receive under the development agreement. On that assumption, as we will later explain, we think that this was, in substance though not in detail, correct in principle. The prima facie measure of damages for the defendants' repudiation was the value by which the plaintiff's interest in her land would have been enhanced by her completed shophouses at the time she accepted the defendant's repudiation, less the value of what she would have parted with, in money or kind, under the agreement by that date.

**[15]** The registrar then held that, as she was not provided with evidence of the value of the plaintiff's land at that date, she was unable to assess damages on the orthodox basis and so proceeded to assess liquidated damages pursuant to cl 9.6. However it appears that, on 27 August, 2007, the plaintiff sought from the registrar leave to adduce further evidence by way of a valuation of the plaintiff's land as at July 2002 and that the registrar dismissed that application on the ground, it seems, that this evidence could have been produced with reasonable diligence at the time of the assessment hearing.

**[16]** An appeal against that dismissal was granted by Findlay JC on 12 September 2007. The learned judicial commissioner held that the justice of the matter required that the registrar should be put in a position to properly assess damages. The matter was then remitted to the registrar to assess damages with the benefit of evidence of the value of the plaintiff's land in 2002. Leave was sought to appeal against this judgment. This was heard by Barnett JC on 20 February 2008 and dismissed by him on 28 February 2008.

**[17]** The matter then returned to the registrar in July, August, September and October 2008 and the registrar gave her judgment on 24 February 2009. In it she concluded that the plaintiff had failed to prove damages suffered as a result of the defendants' breach, that a claim based on liquidated damages should be dismissed and that the plaintiff should pay the defendants' costs. She appears to have reached the first of these conclusions as follows.

**[18]** She concluded that the value of the plaintiff's shophouses at the time that the plaintiff accepted the defendants' repudiation was their construction cost. This was not only inconsistent with principle, as we will demonstrate, but also inconsistent with her earlier reasoning. She appears to have been misled by the following statement in the judgment of Findlay JC of 12 September 2007 in allowing the appeal against her refusal to admit evidence of the value of the land:

> It is quite clear to me that the Registrar was right to say that she could not assess damages on the conventional basis without evidence as to the value of the land. What the plaintiff had lost was the shophouses, not the land. Accordingly the plaintiff should have produced evidence as to the construction costs of the shophouses or the standing value of them, less the value of the land, which the plaintiff had not lost.

**[19]** Regrettably, the last sentence in this passage is, in a number of respects, misleading. As we shall show, the construction costs were irrelevant and, before the registrar, there was considerable debate as to the meaning of the phrase 'standing value' notwithstanding that, as Barnett JC rightly said later, there is no doubt that it meant 'market value'.

**[20]** This, together with submissions on behalf of the defendants, led the registrar to conclude that 'standing value' meant construction cost and that the measure of the plaintiff's damages was the difference between the construction costs under the subject agreement and the construction costs under an agreement, subsequently terminated, which the plaintiff entered into with another developer some time after acceptance of the repudiation. Though there

was evidence of the former, there being no evidence of the latter, the registrar said, accordingly, that she was unable to assess the plaintiff's loss, if any, and dismissed that claim.

**[21]** From that dismissal the plaintiff appealed to the High Court. The appeal was heard by Barnett JC on 31 January 2011 who gave judgment on 9 February 2011. The learned judicial commissioner adopted what was, in our opinion, in substance though not in detail, the orthodox method of assessment: market value of completed shophouses less the market value of the plaintiff's land, together with some adjustment for some of the payments which had been made. Although we disagree with the way in which the learned judicial commissioner applied this principle and with some of his monetary adjustments, we have no doubt as to the general correctness of the principle which he applied.

THE PRINCIPLE AND ITS APPLICATION

**[22]** The ruling principle lying behind an award of damages at common law for breach of contract, including by repudiation, is that stated by Baron Parke in *Robinson v Harmon* [1848] 1 Exch 850, 855; ; 154 ER 363, 365:

> The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

**[23]** See also *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 , 307; *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, [29]. This principle is, we think, consistent with s 74 of the Contracts Act, Chapter 106 and the examples to that section.

**[24]** Mr Rudi Lee, who appeared for the appellants, the defendants in the action, rightly accepted this as the basic principle. Indeed he cited the above passage in his written submissions.

**[25]** It would seem, prima facie, that the starting point for the application of that principle here would be to ascertain what the plaintiff would have had, at the time she accepted the defendants' repudiation, if, by then the contract had been performed. The answer to that question is plain. She would have had 14 completed shophouses, 12 of three stories and two of two stories. These would have been immediately capable of sale or lease and so of valuation on the basis of a sale between a willing but not anxious seller and a similarly willing but not anxious buyer at that date.

**[26]** However Mr Lee contended that this was not the correct principle to apply in this case, or not the correct application of that principle in this case. He advanced two reasons for that.

**[27]** The first was that this was a contract for the construction of shophouses and that, consequently, the starting point for the assessment of damages was the cost, as at June 2002, of constructing the plaintiff's shophouses. He pointed to recital D and cl 2 of the development agreement, both of which, unsurprisingly, refer to development by the defendants of the project. This then led to reliance on *Mertens v Home Freehold Co,* to which we refer in more detail below.

**[28]** We do not think it matters how the development agreement is characterised. The principle applies in the way we have stated it because, by the time of the plaintiff's acceptance of the defendants' repudiation, the time for completion had passed. Consequently, if the contract had been performed, the plaintiff would then have had 14 completed shophouses capable of sale and valuation. And it follows from this that the valuation of the completed shophouses at that date was the starting point for determining what would place her in the same situation as if the contract had been performed.

**[29]** Mr Lee's second reason for submitting that that principle did not apply here was that, he submitted, the plaintiff may thereby be unjustly enriched, by which he meant that, having recovered the value of fourteen completed shophouses, she would remain in full ownership and possession of her land and would therefore still be in a position to engage another developer to develop 40 shophouses on that land. That is factually correct but it is a necessary consequence of the construction of the development agreement. For example, had the development agreement required the plaintiff to transfer to the defendants the whole or part of the land, the plaintiff would have had to bring the value thereof into account in the assessment of her loss. That the agreement, had it been performed, would have yielded a substantial profit to the plaintiff cannot reduce her damages.

**[30]** The factual situation here may be contrasted with two other factual scenarios which illustrate when the cost of completion is the correct starting point for the assessment of loss.

**[31]** If the defendants had partly performed the work but, before the time for completion, had ceased work and the plaintiff had then sued for damages, in order, at that time, to ascertain what was necessary to place her in the same situation as if the contract had been performed, it would have been necessary to ascertain what it would have cost her to complete the work. That is because, at

A the time that the cause of action arose, the plaintiff would not have been entitled to completed shophouses, capable of sale, but to have that work completed.

B **[32]** Similarly if, by failing to commence the work, the defendants had repudiated the agreement, say, one year earlier than the scheduled completion date and the plaintiff had then accepted that repudiation, the plaintiff's measure of damages would have been, prima facie, the full construction cost of the plaintiff's shophouses together with any compensation for any delay beyond the scheduled completion date. Again that is because, at the time the cause of action arose, the plaintiff would not have been entitled to completed shophouses, capable of sale, but to have the construction of them completed.

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D **[33]** So, in both of these examples, the starting point for ascertaining what was needed to place the plaintiff in the same position as if the contract had been performed was the cost of completing it.

E **[34]** *Mertens v Home Freehold Co* [1921] 2 KB 526, relied on by Mr Lee, falls within the first of these examples. A contract for the building of a house, made on 12 May 1916, provided for completion by 10 January 1917. The work proceeded, more or less satisfactorily, until August 1916 when the defendant builder said that he was no longer going on with it. The plaintiff owner affirmed the contract and under a clause of it sought to take the work out of the defendant's hands and to complete it himself. However the plaintiff was unable do this, presumably because of a regulation made under the *defence of the realm act* which, in any event, would have suspended the work in September 1916, by which time, if the defendant had been performing the contract, the roof would have been on. So, on 9 November 1916, the plaintiff commenced her action for breach of contract. It was held that the proper measure of damages, in that case, was the cost of completion.

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H **[35]** We should add that much the same result would have ensued in *Mertens* if the plaintiff, in August when he affirmed the contract, had treated the defendant's statement as repudiation terminating the contract and had sued for damages on that basis. In either case, because the right of action arose before the time for completion had arisen, the correct measure of loss was the cost of completion.

I **[36]** These examples are distinguishable from the present case because, by the time of repudiation and its acceptance here, the time for completion of the shophouses had passed and the plaintiff was then entitled under the contract to 14 completed shophouses and had received nothing. More specifically in the present case, the starting point for the assessment of damages is the extent by

which the completed shophouses would have enhanced the value of the plaintiff's land. That is, of course, because the shophouses were to be constructed on the plaintiff's land.

**[37]** From that starting point must be deducted the consideration which would have passed from the plaintiff had this agreement been performed. The consideration which would have passed from the plaintiff, had the agreement been performed, would have been, prima facie, the value of a 60 year lease to the defendants of the land on which the defendants' 26 shophouses were to be constructed, or, more accurately, the extent to which such 60 year lease to the defendants would have reduced the value of the plaintiff's land. On the other hand, had the agreement being completed by that date, the plaintiff would also have had the expectation that, at the end of 60 years, the value of her land would be enhanced by the construction on it of the defendants' 26 shophouses. So, at least in theory, the value of her reversion in those shophouses at the end of that term should diminish that reduction in the value of the plaintiff's land in consequence of the 60 year lease.

**[38]** The deduction of this net sum from the value of the amount by which the value of the plaintiff's land was enhanced by her completed shophouses was the plaintiff's main loss by reason of the repudiation.

**[39]** As mentioned earlier, there were some sums paid or payable under the agreements which must then be taken into account to adjust that prima facie loss.

**[40]** Before turning to the facts we should say something about mitigation for the registrar seemed to think that a development agreement entered into by the plaintiff with a third party after acceptance of the defendants' repudiation should be taken into account, if not in determining the plaintiff's prima facie loss, in determining whether she had mitigated her loss. This was also the defendants' contention before this court.

**[41]** The first thing which we should note here is that, in mitigation, the onus of proof is on the defendant: *Roper and Anor v Johnson* (1873) LR 8 CP 167. The absence of evidence about the subsequent agreement was not a matter on which the defendants could criticise the plaintiff.

**[42]** Secondly, mitigation is concerned, primarily, with avoidance of future loss. The later the breach the more difficult it is for the plaintiff to take any mitigatory action. Here the completion date had passed and the plaintiff's loss had crystallised by the time she accepted the defendants' repudiation. It is almost inconceivable that the cost of a development contract entered into after

the defendants should have completed the shophouses would yield a better financial result for the plaintiff than the value of the already completed shophouses.

**[43]** In any event, there was no evidence on this point.

**[44]** We turn to the evidence.

THE EVIDENCE

*The value by which the plaintiff's land would have been enhanced by the completed shophouses as at July 2002*

**[45]** The only evidence on this was from Mr Medlicott, a valuer whose report was admitted on behalf of the plaintiff. There is also before us a report by another valuer, Ms Lim, dated 28 Jul 2008. It is unclear whether it was ever in evidence before the registrar on 24 February 2009 or before the learned judge on 9 February 2011. Neither referred to it. In any event, it values the defendants' completed shophouses, the value of which, on our analysis, is not relevant in the assessment of damages. However Ms Lim's valuation of the defendants' two storey shophouses was, per unit, higher than Mr Medlicott's valuation of three storey shophouses and would, therefore, have yielded a higher award of damages than that calculated on the basis of the latter's valuation.

**[46]** In Mr Medlicott's opinion, the plaintiff's completed shophouses would have been worth $4,045,900 in 2002. However, as the defendants pointed out, this was on the assumption that all were of three stories.

**[47]** It will be recalled that the second supplementary agreement, which provided that, in lieu of 14 three-storey shophouses the plaintiff was to receive 12 three-storey shophouses and two two-storey shophouses, also provided that $80,000 would be paid by the defendants to the plaintiff by two instalments. Judicial Commissioner Barnett inferred that these two provisions were related; that the money payment was in consideration of the plaintiff's reduced entitlement. Although the plaintiff also gave evidence that this was so, we do not think that any weight should be placed on this evidence; the evidence of a party to a written agreement is not admissible to prove its meaning. Nevertheless, as we indicated earlier, we think that the construction adopted by the judicial commissioner is a correct construction of this agreement.

**[48]** The learned judicial commissioner then went on to say that, as no part of this sum had been paid, he thought that the amount of $4,045,900 was appropriate to allow. However it appears that he was wrong in fact in this

respect. The plaintiff herself affirmed that she had received $25,000, the first instalment of this. Consequently, though we agree with his conclusion as to the construction of the second supplementary agreement we think that the sum of $4,045,900 must be reduced by $55,000.

**[49]** However, as we have concluded, the value of what the plaintiff would have received on that date was less than the full value of the completed shophouses, and of that value reduced by $55,000. It would have been that latter value reduced by the value of the land which the plaintiff would have contributed to that completion. That would then have represented the amount by which the value of her land had been enhanced by the construction on it of her shophouses.

**[50]** Again Mr Medlicott's opinion on this point was undisputed. He gave as the valuation of that part of the plaintiff's land which would be occupied by her shophouses, on the basis that it was unencumbered as $532,896. Accordingly this yields a net sum of $3,458,004.

*The value of the consideration which would have passed from the plaintiff*

**[51]** The learned judicial commissioner took that to be the value of the land. However that was unduly generous to the defendants for the plaintiff would not have lost the whole of her interest in the land; merely the reduction in value of her land because of a 60 year lease of the land occupied by twenty six shophouses. On the other hand, the value of her land would have been enhanced by the prospect that, at the end of 60 years, the land would return to her (or, more likely, her heirs) enhanced by the construction of 26 shophouses.

**[52]** Mr Medlicott valued the land as at February 2002 as if unencumbered and also on the assumption that it was subject to a 60 year lease over the 26 shophouses. The former valuation was $1,522,560; the latter was $1,356,327. It follows, on these valuations, that, if the contract had been performed, the plaintiff would have retained her land reduced in value by $166,233.

**[53]** However the learned judicial commissioner took, as the value of the land, $1,200,000, its sale price in October 2007, more than five years after the relevant date, notwithstanding the absence of any evidence that its value in 2007 was the same as its value in 2002. The learned judicial commissioner gave no reason for accepting this as the correct value of the land in February 2002, or for, implicitly, rejecting Mr Medlicott's uncontradicted valuation as at that date, notwithstanding that, in other respects, he accepted Mr Medlicott's valuations. We think that he should have accepted Mr Medlicott's contemporaneous valuation here rather than the sale price five years later.

**[54]** There was no valuation evidence as to how much, if at all, the plaintiff's remainder interest in this part of her land would have been enhanced, in 2002, by the expectancy that, at the end of sixty years, that interest would have been in land developed with 26 shophouses. Accordingly, though this might have increased the plaintiff's damages, it must be ignored.

**[55]** Leaving aside monetary payments under the agreements, $166,233 is the value of the consideration which she would have passed under the agreements.

**[56]** Subtracting this sum from the above sum of $3,458,004 yields a net loss of $3,291,771.

*The respondent's notice of contention*

**[57]** Because of the matters to which we have referred, by letter to the parties on 14 May 2011, the court invited the parties to consider whether the learned judge may have wrongly assessed the plaintiff's loss, and whether her loss, and consequently her damages, may have been higher than those assessed by the judge. In consequence, the respondent sought an extension of time within which to file a notice making contentions to that effect and filed such a notice. At the outset of the hearing the court granted that extension and proceeded to hear argument from both parties upon that notice and upon the alternative method of assessment suggested by the court.

*Monetary payments under the agreements*

**[58]** Other than the sums of $30,000 payable to the plaintiff's daughter under cl 2 of the first supplementary agreement and of $25,000 payable under cl 3(a) of the second supplementary agreement the plaintiff admits to receiving from the defendants only the total of loans of $461,449. It is plain that neither of the first two sums is repayable. However the last sum is repayable and must be brought into account.

**[59]** Although the sum of $70,000, the balance of $100,000 payable under cl 1 of the first supplementary agreement remained unpaid, the learned judicial commissioner rejected the plaintiff's claim for this because it was not pleaded. In her notice of contention the plaintiff contends that this sum should have been awarded. It is contended that, because that sum was part of general damages, it did not need to be pleaded. We do not agree. We think that it should have been notwithstanding that it formed part of the plaintiff's damages.

**[60]** However the amount was plainly payable under the first supplementary

agreement, it was not paid and the defendants were and are unable to defend its non payment. We therefore think that it should be included.

**[61]** Bringing these two sums into account this results in a total of damages of $2,900,322, a sum substantially higher than that assessed by the learned judicial commissioner and higher than that contended for by the respondent in her notice. However when that was pointed out to the respondent, the latter, unsurprisingly, adopted the method of calculation suggested from the bench. We accordingly award that sum and give judgment for that sum.

**[62]** We agree with the learned judicial commissioner that the plaintiff was entitled to interest on that sum from the date on which she might reasonably have expected to receive the completed shophouses. However that was, as we have said, 20 March 2002. Consequently we think that interest should run from that date rather than, as the judge held, 1 January 2002. As neither party contends to the contrary, we adopt the learned judge's rate of 3%. However the parties agree that, from the date of judgment, the rate should be 6%. That date is 9 February 2011, the date of judgment of the learned judge.

**[63]** As to costs, Mr Lee rightly concedes that, in these events, the appellants must pay the respondent's costs, save for the costs of filing and serving the respondent's notice, pursuant to O 57 r 7, of 17 May 2011, and the associated notice of motion seeking an extension of time within which to file and serve that notice.

ORDERS

**[64]**

(a) Dismiss the appeal;

(b) allow the respondent's contentions in part;

(c) set aside the judgment of $2,384,451 and substitute judgment for $2,900,322;

(d) allow interest on that sum from 20 March 2002 to 9 February 2011 at 3% and from 9 February 2011 until payment at 6%; and

(e) save for the costs of filing and serving the respondent's notice, pursuant to

A O 57 r 7, of 17 May 2011, and the associated notice of motion seeking an extension of time within which to file and serve that notice, that the appellants pay the respondent's costs of appeal.

*Appeal dismissed but substituting sum of RM2,900,322 in place of damages* B *awarded below, with interest and costs.*

Reported by Ashok Kumar

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